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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

LEGACY CONSTRUCTION AND DEVELOPMENT, INC., Plaintiff and Appellant, v. ANTONIO DE FRANCESCA et al., Defendants and Respondents.	B208851 (Los Angeles County Super. Ct. No. BC351452)

APPEAL from a judgment of the Superior Court of Los Angeles County, William F. Highberger and Mary H. Strobel, Judges. Affirmed in part, reversed in part.

Huang, Fedalen & Lin, James C. Fedalen and Robert L. Mason II for Plaintiff and Appellant.

Eric D. Bennett for Respondent Antonio De Francesca.

No appearance for Respondents Anthony De Francesca and Marmi & Graniti Italiani, Inc.

This appeal arises from an effort by Legacy Construction and Development, Inc. (Legacy) to enforce a judgment it obtained in a construction lawsuit against parties who were not defendants in the first action, but whom it alleges were partners in the judgment debtor, DTS, a California partnership. Legacy contends the trial court erred in sustaining a demurrer to its causes of action for misrepresentation and in finding an individual defendant, Antonio De Francesca, not liable on either alter ego or ostensible partnership theories. In addition, Legacy argues that Antonio De Francesca was not entitled to an award of attorney fees under Civil Code section 1717, and challenges the amount of fees awarded to him. Finally, Legacy contends the trial court abused its discretion in setting the amount of fees it was awarded as prevailing party against another defendant.

We conclude the trial court erred in sustaining the demurrer to the misrepresentation causes of action on the ground that they arose from the same primary right as the initial action brought by Legacy against DTS. Substantial evidence supports the trial court's findings that Antonio De Francesca was not liable on the judgment against DTS under either an alter ego or ostensible partnership theory. As a prevailing party, Antonio was entitled to an award of contractual attorney fees. We find no abuse of discretion in the amount he was awarded. Similarly, we find no abuse of discretion in the amount of fees awarded to Legacy.

FACTUAL AND PROCEDURAL SUMMARY

Legacy is a general contractor who performed work on a project for Andrew M. Rosenfeld. It subcontracted with DTS to install stonework on the Rosenfeld project. The stonework was not satisfactory and was not completed, so Legacy did not pay DTS the full amount it was owed under the subcontract. DTS responded by suing Legacy and others for breach of contract and to foreclose on a mechanics lien against Rosenfeld. (*DTS v. Legacy Construction and Development, Inc.* (Super. Ct. L.A. County, 2006, No. BC313712).) Legacy and Rosenfeld cross-complained against DTS and its surety on its contractor's license bond for breach of contract, breach of implied warranty, and negligence. (Since there are no issues on appeal regarding the DTS action against

Legacy, we refer to the cross-complaint simply as *Legacy I*.) In December 2005, following a bench trial, Legacy obtained a judgment on all three causes of action against DTS. It also was awarded costs and attorney fees under Civil Code section 1717 for a total judgment of $75,872.90. DTS took nothing on its complaint against Legacy.

In April 2006, Legacy sued Antonio De Francesca, Jr., MGI, Inc. and Marmi & Graniti Italiani, Inc. for declaratory relief, seeking a determination of the defendants' responsibility for the judgment in *Legacy I* under Corporations Code section 16306. (*Legacy Construction and Development, Inc. v. De Francesca* (Super. Ct. L.A. County, 2006, No. BC351452), *Legacy II*.) The defendants obtained judgment on the pleadings on the complaint and Legacy was granted leave to amend.

Legacy's first amended complaint added Anthony De Francesca as a defendant, and clarified that MGI and MGI, Inc. were aliases for defendant Marmi & Graniti Italiani, Inc.[1] (Since Antonio De Francesca and his son, Anthony De Francesca, were both defendants, we refer to them by their first names to avoid confusion.[2]) The first amended complaint also added causes of action for intentional and negligent misrepresentation. The defendants demurred.[3] The trial court sustained the demurrer to the causes of action for misrepresentation, but overruled the demurrer as to the cause of action for declaratory relief. The trial court construed the cause of action for declaratory relief as a claim under Corporations Code section 16308 for partnership liability rather than an alter ego claim.[4]

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1 We refer to this defendant as MGI.

2 At trial, Antonio was sometimes referred to as "Anthony Sr." and Anthony was referred to as "Anthony Jr."

3 The demurrer was brought by defendants Antonio De Francesca and MGI. We are informed that Anthony De Francesca joined in the demurrer.

4 Legacy sought relief from the order sustaining the demurrer by petition for writ of mandate (No. B199169) but the petition was denied for failure to demonstrate entitlement to extraordinary relief.

A bench trial was conducted on the declaratory relief cause of action. The issues were bifurcated, with the question of the defendants' liability under Corporations Code section 16308 as partners in DTS to be decided first, and whether defendants were in privity with DTS to be tried in the second phase. The trial court granted a motion for nonsuit by Antonio and MGI "as to the Alter Ego Claim v. Antonio De Francesca, Sr. re any liability of MGI, Inc.," but denied the motion as to the rest of plaintiff's case.

At the conclusion of the presentation of evidence, following closing arguments, the trial court issued an oral statement of decision: "The Court finds there is [privity] between MGI and DTS and Antonio Jr. and DTS. [¶] Judgment in favor of defendant Antonio De Francesca, for failure of proof; and against defendants Anthony De Francesca, and MGI, finding that the necessary elements are made; the dollar amount of the judgment is the same as in the prior judgment; plus attorney fees to prevailing party." Based on his request, Antonio was directed to submit a proposed written statement of decision. Judgment in favor of Legacy against Anthony and MGI for a total of $90,731.34 (including interest) was awarded. Legacy took nothing against Antonio, who was awarded his costs and fees.

Legacy moved for a determination that it was the prevailing party and for its fees. Antonio also brought a fee motion. The court awarded Legacy fees in the amount of $67,790.25 and costs of $7,281.80. The court ruled Antonio also was a prevailing party and awarded him $19,150 in fees and $754.45 in costs. An amended judgment reflecting the fee and costs awards was filed June 3, 2008.

Legacy appealed from the judgment. It filed an amended notice of appeal from the order granting fees and costs and from the amended judgment filed June 3, 2008. Antonio's motion to dismiss the appeal as untimely was denied. No appellate brief has been filed by any respondent.

DISCUSSION

I

Legacy argues the trial court erred in sustaining a demurrer to its causes of action for misrepresentation without leave to amend. The trial court ruled that Legacy had split its causes of action between *Legacy I* and *Legacy II* based on its conclusion that the misrepresentation causes of action in *Legacy II* were based on the same primary right as those in *Legacy I*. In reviewing a demurrer, we examine the complaint de novo, treating the demurrer as admitting all material facts properly pleaded. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.)

"'"To determine the scope of causes of action, California courts employ the 'primary rights' theory. Under this theory, the underlying right sought to be enforced determines the cause of action. In determining the primary right, 'the significant factor is the harm suffered.' [Citation.]"' (*Craig v. County of Los Angeles* (1990) 221 Cal.App.3d 1294, 1301, quoting *Takahashi v. Board of Education* (1988) 202 Cal.App.3d 1464, 1474.)" (*Brenelli Amedeo, S.P.A. v. Bakara Furniture, Inc.* (1994) 29 Cal.App.4th 1828, 1836 (*Brenelli*).)

Each cause of action in the first amended complaint alleges a theory of liability based on harm resulting from the misrepresentation that MGI was responsible for the work done on the Rosenfeld project. The first and second causes of action for intentional and negligent misrepresentation allege that in reliance on the representations, Legacy subcontracted with DTS and would not have done so had it known the true facts.

The first action (*Legacy* I) was for breach of contract while the second action was for tortious conduct which impeded the ability of Legacy to collect on the judgment for breach of contract. These are distinct primary rights. As the *Brenelli* court explained, the right to have contractual obligations performed is distinct from the right to be free from tortious behavior preventing collection of a judgment. (*Brenelli*, *supra*, 29 Cal.App.4th at p. 1837; see also *Sawyer v. First City Financial Corp.* (1981) 124 Cal.App.3d 390 [action for breach of contract and an action for alleged conspiracy to conduct a sham foreclosure sale involved distinct primary rights].)

The trial court erred in sustaining the demurrer to the misrepresentation causes of action on the ground that Legacy had impermissibly split its causes of action. The doctrine of res judicata does not bar the misrepresentation causes of action in *Legacy II*.

II

This brings us to Legacy's challenges to the judgment for Antonio in *Legacy II*. In its first amended complaint, and at trial, Legacy took the position that Anthony and MGI were partners in DTS.[5] (Anthony conceded at trial that he was a partner in DTS.) As to Antonio, Legacy sought to prove he was the alter ego of MGI, but not of DTS. In order to reach Antonio, Legacy had to prove that MGI was liable for the judgment against DTS as a partner, then that Antonio was liable for MGI's debts as an alter ego. But the trial court rejected the alter ego theory as to Antonio at the close of Legacy's case by granting what the counsel for Antonio characterized as a motion for nonsuit. Legacy argues the trial court erred in finding Antonio is not the alter ego of MGI.

Although Antonio characterized his motion at the close of Legacy's evidence as one for nonsuit, because this was a bench trial, the proper motion was for judgment pursuant to Code of Civil Procedure section 631.8. (*Ford v. Miller Meat Co.* (1994) 28 Cal.App.4th 1196, 1200.) In weighing the evidence on such a motion, the trial court may refuse to believe witnesses. (*Ibid.*) If the motion is granted, the court's findings are "'"entitled to the same respect on appeal as any other findings and are not reversible if supported by substantial evidence. [Citations.]"' ([*Heap v. General Motors Corp.* (1977) 66 Cal.App.3d 824,] 829-830.)" (*Ford,* at p. 1200.)

"'The alter ego doctrine arises when a plaintiff comes into court claiming that an opposing party is using the corporate form unjustly and in derogation of the plaintiff's interests.' (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 300.)" (*Mid-Century Ins. Co. v. Gardner* (1992) 9 Cal.App.4th 1205, 1212.) We review a trial court's findings on an issue of alter ego liability for substantial evidence. (*Baize v. Eastridge Companies* (2006) 142 Cal.App.4th 293, 302.)

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5 Legacy expressly repudiated a theory that MGI was the alter ego of DTS.

"The two principal questions to establish alter ego are whether there is 'such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist' and whether there would be 'an inequitable result if the acts in question are treated as those of the corporation alone.' (*Sonora Diamond Corp. v. Superior Court* [(2000)] 83 Cal.App.4th [523,] 538.) The courts consider numerous factors, including inadequate capitalization, commingling of funds and other assets of the two entities, the holding out by one entity that it is liable for the debts of the other, identical equitable ownership in the two entities, use of the same offices and employees, use of one as a mere conduit for the affairs of the other, disregard of corporate formalities, lack of segregation of corporate records, and identical directors and officers. (See *Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1285.) No single factor is determinative, and instead a court must examine all the circumstances to determine whether to apply the doctrine. [Citation.]" (*VirtualMagic Asia, Inc. v. Fil-Cartoons, Inc.* (2002) 99 Cal.App.4th 228, 244-245.)

Legacy claims unity of interests and identity between Antonio and MGI because (1) Antonio is the sole shareholder, officer and director of MGI; (2) both MGI and DTS used Antonio's home address as their official business addresses; and (3) MGI did not observe corporate formalities because the corporate minute book was not updated for at least five years before trial.

Much of the evidence cited by Legacy to support its alter ego theory between MGI and Antonio actually relates to the relationship between MGI and DTS. As we have seen, the trial court found privity between MGI and DTS. Legacy relies on evidence that (1) bids for work to be performed by DTS were submitted on MGI letterhead; (2) using checks signed by Antonio, MGI paid all expenses for DTS and Anthony; (3) Antonio made personal loans to Anthony out of MGI funds; (4) Antonio falsified a sublease between MGI and DTS; and (5) Legacy's only payment to DTS for work on the Rosenfeld project, a check payable to DTS, was endorsed by Antonio on behalf of DTS and deposited into MGI's bank account by Antonio.

Finally, some of the evidence cited by Legacy concerns Antonio's involvement in the dispute and litigation between Legacy and DTS. John Valdez of Legacy testified that Antonio contacted Legacy (by phone and in writing) demanding payment to DTS. Antonio attended a settlement conference held in *Legacy I*. He went to the Rosenfeld site with the attorney representing DTS in *Legacy I* and discussed the work, material and workmanship. When the attorney for DTS was asked whether Antonio gave him instructions on the *Legacy I* litigation, the attorney said: "Not instructions. He just would put his two cents in. But he didn't instruct me, no." The attorney testified that he took instructions only from Anthony.

Legacy claims that Antonio "inspected" the progress of work done by DTS on the Rosenfeld project. At trial, Antonio denied ever inspecting the Rosenfeld project. He was impeached with his deposition testimony in which he was asked: "Did you ever see the project that your son had done, which prompted him to have to sue Legacy?" Antonio responded: "Yes." Later he claimed not to recall whether the project was complete when he saw it. He again was impeached with his deposition testimony in which he stated that the project was not complete when he saw it. While this evidence establishes that Antonio saw the Rosenfeld project before completion, it does not necessarily support Legacy's characterization that Antonio "inspected" the work done by DTS.

While Antonio was the sole shareholder, officer and director of MGI, Legacy presented no evidence that MGI was under-capitalized or that MGI held itself out as liable for the debts of Antonio, or vice versa. Although there was evidence that MGI loaned money to Anthony and DTS, there was no evidence that Antonio commingled his assets with MGI. On this record, there was substantial evidence to support the trial court's conclusion that Legacy failed to pierce the MGI corporate veil to prove that Antonio was the alter ego.

The only argument Legacy makes as to the second prong for alter ego liability, an inequitable result, is: "That an inequitable result occurred is obvious. Legacy had to file a second suit in an effort to collect the debt." " [E]ven if the unity of interest and

ownership element is shown, *alter ego will not be applied absent evidence that an injustice would result from the recognition of separate corporate identities, and* '*[d]ifficulty in enforcing a judgment or collecting a debt does not satisfy this standard*.' (*Sonora Diamond Corp. v. Superior Court*, *supra*, 83 Cal.App.4th at p. 539.)" (*VirtualMagic Asia, Inc. v. Fil-Cartoons, Inc.*, *supra*, 99 Cal.App.4th at p. 245, italics added.) The Court of Appeal in *Sonora Diamond Corp. v. Superior Court* explained: "The alter ego doctrine does not guard every unsatisfied creditor of a corporation but instead affords protection where some conduct amounting to bad faith makes it inequitable for the corporate owner to hide behind the corporate form." (83 Cal.App.4th at p. 539.)

We find no error in the trial court's ruling that Antonio was entitled to judgment on the alter ego theory.

III

Alternatively, Legacy argues the trial court erred in failing to find that Antonio was an ostensible partner of DTS. It claims that "Antonio *is* MGI." It contends that Antonio performed every act on behalf of MGI which supports the trial court's finding that MGI was "co-responsible" on the DTS debt. Legacy invokes Corporations Code section 16308, subdivision (a), a part of the California Uniform Partnership Act of 1994: "If a person, by words or conduct, purports to be a partner, or consents to being represented by another as a partner, in a partnership or with one or more persons not partners, the purported partner is liable to a person to whom the representation is made, if that person, relying on the representation, enters into a transaction with the actual or purported partnership. If the representation, either by the purported partner or by a person with the purported partner's consent, is made in a public manner, the purported partner is liable to a person who relies upon the purported partnership even if the purported partner is not aware of being held out as a partner to the claimant. If partnership liability results, the purported partner is liable with respect to that liability as if the purported partner were a partner. If no partnership liability results, the purported

partner is liable with respect to that liability jointly and severally with any other person consenting to the representation."

Legacy argues: "There was no evidence presented by Antonio that shows whether in doing each of [the] acts which caused the court to find that MGI was an ostensible partner of DTS Antonio was acting as a partner of DTS or as an employee of MGI, which was a partner in DTS or both." It asserts that the burden was on Antonio to prove this distinction, citing *Summers v. Tice* (1948) 33 Cal.2d 80. *Summers v. Tice*, a landmark tort case, held that shifting the burden of proof on causation to defendants was justified because otherwise the tortfeasors might escape liability, leaving the plaintiff without a remedy. (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 958.) That doctrine has no application here, where the issue is proof of ostensible partnership rather than causation in the context of joint tortfeasors. It was Legacy's burden to prove Antonio was an ostensible partner of DTS.

In *Armato v. Baden* (1999) 71 Cal.App.4th 885, the court considered the predecessor of Corporations Code section 16308, former Corporations Code section 15016 which is not significantly different from section 16308.[6] The *Armato* court relied on *Moen v. Art's Café* (1950) 95 Cal.App.2d 577, which had construed the predecessor to former Corporations Code section 15016. The *Moen* court observed that the rule of liability for partnership by estoppel or ostensible partnership is founded upon the doctrine of equitable estoppel. (*Id*. at p. 579.) "'The question to be answered when it is contended that a defendant is an ostensible partner is whether the acts and conduct of an

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6 Former section 15016 provided in pertinent part: "'(1) When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him to any one, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership. . . . [¶] . . . [¶] (2) When a person has been thus represented to be a partner in an existing partnership, or with one or more persons not actual partners, he is an agent of the persons consenting to such representation to bind them to the same extent and in the same manner as though he were a partner in fact, with respect to persons who rely upon the representation. . . .'" (*Armato v. Baden*, *supra*, 71 Cal.App.4th at p. 898.)

individual were factually and legally sufficient to lead another person to believe he was a copartner and assumed responsibility for such.' [Citation.]" (*Armato v. Baden, supra*, 71 Cal.App.4th at p. 898.) It is not necessary that the partnership representations or acts be committed with actual intent; "it is sufficient if the course of conduct is such as to induce a reasonable and prudent person to believe that which the conduct would imply. [Citation.]" (*Ibid.*)

No ostensible partnership was found in *Armato v. Baden, supra*, 71 Cal.App.4th 885, because there was no evidence that the defendants represented themselves as partners or that they consented to such a representation by another. In addition, evidence that the defendants may have allowed their names to be listed on the door to the medical office, and perhaps on appointment cards and prescription pads, was found insufficient to establish that plaintiff relied upon any alleged representation that there was a partnership. (*Id*. at pp. 898-899.)

Citing *Armato v. Baden, supra*, 71 Cal.App.4th 885, Legacy asserts: "As above, proffered evidence that establish [*sic*] that father and son acted like partners, sharing the control of their family business, and that their conduct was reasonably seen as evidencing a partnership as the acts of Antonio and MGI are indistinguishable. Moreover, the trial court explicitly found that MGI was a partner of DTS. Since, as above, for all intents and purposes, Antonio was MGI, it must follow that Antonio was also an ostensible partner of DTS."

As we have discussed, there was ample evidence that *MGI* was an ostensible partner of DTS. But Legacy glosses over the requirement that *Antonio* had to be proven to be a partner in DTS. Instead, it seems to argue that the representations regarding MGI's partnership should be applied to find Antonio personally liable. This argument is contrary to Corporations Code section 16308. Legacy cites no specific evidence that Antonio was represented to be a partner in DTS. The trial court properly found for Antonio on this theory.

IV

As we have discussed, both Antonio and Legacy were awarded attorney fees under a fee provision in the subcontract between DTS and Legacy. Legacy argues that Antonio was not entitled to attorney fees because he could not have been a prevailing party in the case. It reasons that there can be only one prevailing party under Civil Code section 1717 (section 1717) because fees are awarded to the party who recovers the greater relief.

A. Fees Under Section 1717

"In an action on a contract, section 1717 permits an award of attorney's fees to the prevailing party. '[T]he party prevailing on the contract shall be the party who recovered *a greater relief in the action on the contract*. The court may also determine that there is no party prevailing on the contract for purposes of this section.' (§ 1717, subd. (b), italics added.) A declaratory relief action that seeks to establish the parties' rights under a contract is an action to enforce the contract. (*Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 710-711.)" (*Silver Creek, LLC v. Blackrock Realty Advisors, Inc.* (2009) 173 Cal.App.4th 1533, 1538.)

If one party obtains "a simple, unqualified win" by either completely succeeding on its contract claim or by defeating the contract claim, the trial court cannot deny an award of fees under section 1717. (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 875-876.) But where neither party achieves a complete victory, the trial court has discretion to determine "which party prevailed on the contract or whether, on balance, neither party prevailed sufficiently to justify an award of attorney fees." (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1109.)

"[I]n deciding whether there is a 'party prevailing on the contract,' the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources. The prevailing party determination is to be made only upon final resolution of the contract claims and only by 'a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions.' [Citation.]" (*Hsu v. Abbara, supra,* 9 Cal.4th at p. 876.) The *Hsu* court

emphasized that the courts are to "respect substance rather than form" in determining the prevailing party: "For example, a party who is denied direct relief on a claim may nonetheless be found to be a prevailing party if it is clear that the party has otherwise achieved its main litigation objective. [Citations.]" (*Id*. at p. 877.)

On appeal from a fee order, we accord the trial court wide discretion in determining which party is prevailing under section 1717 and will not disturb the determination unless "a manifest abuse of discretion, a prejudicial error of law, or necessary findings not supported by substantial evidence" is demonstrated. (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 577.)

B. Antonio Was the Prevailing Party

In *Pueblo Radiology Medical Group, Inc. v. Gerlach* (2008) 163 Cal.App.4th 826, the plaintiff sued a corporation and its two shareholders for breach of contract, alleging that the shareholders were the alter egos of the corporation. The alter ego issue was bifurcated from the breach of contract issue. Following a bench trial on the alter ego theory, the trial court found in favor of the individual shareholders and awarded them attorney fees under section 1717. On appeal, the plaintiff argued the fee award was premature because the breach of contract issue had not been decided. The Court of Appeal disagreed, holding: "The trial court's determination that respondents were not the alter egos of the corporation effectively ended the case as to them. They were entitled to recover attorney fees under the contract." (*Id*. at p. 829.)

Here, following the presentation of Legacy's case, Antonio obtained a ruling that he was not the alter ego of the corporation. At the end of the trial, the trial court also rejected the theory that Antonio was an ostensible partner or joint venturer with DTS. Antonio thus obtained an adjudication that he was not liable to Legacy on any theory, entitling him to attorney fees under section 1717. In *Pueblo Radiology*, *supra*, 163 Cal.App.4th 826, the possibility that the plaintiff might ultimately prevail against the remaining corporate defendant on the breach of contract claim did not extinguish the individual defendants' victory on the alter ego claims. Similarly, the fact that Legacy

ultimately obtained a judgment against Anthony and MGI did not extinguish Antonio's win against Legacy. Antonio was entitled to his fees under section 1717.

C. The Amount of Antonio's Fees

Legacy also argues that the trial court abused its discretion in determining the amount of fees awarded to Antonio. The trial court has broad discretion in determining the amount of a fee award. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) As the Supreme Court explained: "'The "experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong"'—meaning that it abused its discretion. [Citations.]" (*Ibid.*)

Legacy first presents a number of related equitable arguments against the award of fees to Antonio. First it contends the court's award of half the fees Antonio and MGI incurred in their joint defense deprived Legacy of the full compensation it deserves as prevailing party on the contract action. Resurrecting its unsuccessful alter ego and ostensible partnership arguments regarding Antonio, Legacy also argues: "The court's discretion to award such an exorbitant fee to Antonio should also be limited because the defendants with whom Antonio had a unity of interests—including the same attorney, the same legal arguments, and the same factual involvement—suffered an unequivocal loss." Not surprisingly, Legacy cites no authority to support this novel argument.

In addition, Legacy contends that the absence of a finding that Antonio was innocent or that he had clean hands, in either *Legacy I* or this action, should "weigh heavily" against the discretionary award of fees to him. This argument is puzzling since Antonio was not a party to *Legacy I* and no finding of unclean hands was required in this action because he was successful in defeating Legacy's claims against him. Legacy apparently is arguing the trial court was required to make a finding that Antonio acted with clean hands in contesting the claim that he was liable for *Legacy I* before he could be awarded fees. It cites *Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th 970, in support of this proposition. The case is inapposite. It was a malicious prosecution action in which the trial court granted plaintiff summary

adjudication on the defendant's affirmative defense that the plaintiff had acted with unclean hands. Attorney fees were not addressed in the passage cited by Legacy.

We find no basis for reversal of the fee award to Antonio on these equitable arguments, and turn to Legacy's alternative contention that Antonio was not entitled to fees because he presented a joint defense with MGI, represented by the same counsel at the trial of this matter. Legacy acknowledges that the alter ego claim was unique to Antonio, but argues that Antonio did not demonstrate why he should receive fees for work performed on issues common to MGI.

The trial court concluded: "Given the posture of this case, I don't think it's possible to award attorney fees with any kind of mathematical precision given the joint representation and the fact that plaintiff prevailed against three defendants and not the fourth defendant. [¶] But taking into account all of those arguments, I think that the tentative ruling appropriately apportions the fees and costs—or the attorney's fees in this case. [¶] So attorneys' fees will be awarded to plaintiff Legacy Construction & Development against Defendants Anthony De Francesca and [¶] . . . MGI, Inc. in the amount of $67,790.25. . . . [¶] The court also finds that defendant Antonio De Francesca, senior is the prevailing party as against Legacy Construction, and attorneys' fees are awarded to Mr. De Francesca, senior against Legacy in the amount of $19,150." Antonio had requested fees of $42,130. His attorney, who also represented MGI, declared that the fees incurred in defending *Legacy II* were not apportioned between the defense of MGI and Antonio "as that would be impractical under the circumstances of this defense."

Citing cases discussing the award of costs, as opposed to fees,[7] Legacy asserts that the fees claimed by Antonio were in effect unnecessary because he was jointly represented with MGI, which was found liable. We disagree. Legacy litigated the theory that both MGI and Antonio were liable for the judgment in *Legacy I* as ostensible partners of DTS. As we have discussed, it also claimed unsuccessfully that Antonio was

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[7] The prevailing party of an award of costs is not necessarily the prevailing party for an award of attorney fees. (*Hilltop Investment Associates v. Leon* (1994) 28 Cal.App.4th 462, 467-468.)

the alter ego of MGI. The record establishes that much of the evidence relating to these issues was intertwined. (See *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129-130.) In an apparent effort to be fair to Legacy, the trial court reduced the amount of the fees awarded to Antonio by over half. Legacy has not demonstrated that the trial court abused its broad discretion in making this award.

VI

Legacy claimed attorney fees of $106,352.50 in litigating this action but was awarded $67,790.25. It argues: "[A]bsent some showing that the fees incurred were unreasonable or unjust, the court should have awarded Legacy its full measure of fees." In support of this contention, Legacy quotes *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1133: "('[A]bsent circumstances rendering the award unjust, an attorney fee award should ordinarily include compensation for all the hours reasonably spent, including those relating solely to the fee.') (emphasis added)." *Ketchum* discussed an award of attorney fees under Code of Civil Procedure section 425.16, subdivision (c) for a defendant who successfully moved to strike a strategic lawsuit against public participation (SLAPP). It does not support Legacy's argument concerning a contractual fee award.

Section 1717, which applies to reciprocal attorney fee clauses like the one in this case, provides that *reasonable* attorney fees are to be fixed by the court. (*PLCM Group, Inc. v. Drexler, supra*, 22 Cal.4th at p. 1091.) "'California courts have consistently held that a computation of time spent on a case and the reasonable value of that time is fundamental to a determination of an appropriate attorneys' fee award.' [Citation.] The reasonable hourly rate is that prevailing in the community for similar work. [Citations.] The lodestar figure may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided. [Citation.] Such an approach anchors the trial court's analysis to an objective determination of the value of the attorney's services, ensuring that the amount awarded is not arbitrary. [Citation.]" (*Id.* at p. 1095.) The trial court has broad authority to fix the amount of a reasonable fee. (*Ibid.*) In exercising its discretion, the trial court considers

"'a number of factors, including the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances in the case.' [Citation.]" (*Id*. at p. 1096.)

Legacy asserts that the trial court ignored the lodestar process, and "compounded its error of determining that there were two prevailing parties when there can only be one, by using what appears to be a simple 'split the baby' formula, by which the court arbitrarily limited Legacy to roughly *two-thirds* of its fees and costs, while awarding Antonio *one-half* of the fees incurred by him and MGI." In a related argument, Legacy asserts that the fee award should be reversed because it was made by a judge other than the judge who presided at the bench trial.

We find no abuse of discretion. Legacy prevailed against only two of the three defendants it sued. It failed to present sufficient evidence on either of its two theories of liability against Antonio. Since Anthony conceded early on at trial that he was a partner of DTS, the majority of the trial time was taken up with Legacy's unsuccessful effort to hold Antonio liable for the DTS judgment. Although the judge who made that determination did not preside over the bench trial, the parties had an ample opportunity to brief and argue the fee award issue. Under these circumstances, we find no abuse of the trial court's discretion in determining the fee award to Legacy.

DISPOSITION

The amended judgment is reversed only as to the ruling sustaining the demurrer to the causes of action for intentional and negligent misrepresentation. In all other respects, the amended judgment is affirmed. Each side is to bear its costs on appeal, if any.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

EPSTEIN, P.J.

We concur:

WILLHITE, J.

SUZUKAWA, J.